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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN JOSEPH LEWIS, Defendant and Appellant.	2d Crim. No. B208585 (Super. Ct. No. 2007002281) (Ventura County)

John Joseph Lewis appeals a judgment after his conviction of first degree murder (Pen. Code, § 187, subd. (a))[1] with special circumstance findings that he committed the offense for the benefit of a criminal street gang (§ 190.2, subd. (a)(22)), that the murder was carried out for financial gain (§ 190.2, subd. (a)(1)), and at least one principal acting on behalf of the gang personally discharged a firearm causing death (§ 12022.53, subds. (d), (e)(1)). We conclude, among other things, that 1) Lewis's statement to a bail bond agent was properly admitted as an exception to the hearsay rule, 2) there was sufficient evidence to corroborate the testimony of Lewis's accomplices, 3) Lewis has not shown prejudicial prosecutorial misconduct, but 4) the court erred by imposing a $10,000 restitution fine under section 1202.45. We strike the fine. In all other respects, we affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS

The Black Mafia Gangsters (BMG) is a criminal organization which requires its members to "do work" (commit crimes) for the gang. Senior members are called "big homies," and in gang culture they are entitled to be treated with respect from younger gang members.

Lewis, Fred Williams, Kufanya Gentry, Donald Brown and Bakari Pitts were BMG members. In December of 2005, Gentry was shot by someone in Oxnard.

Pitts's Testimony

After Gentry was shot, Lewis drove Pitts to Ventura where they met Gentry. Gentry said that Williams and Kevin Lee shot him and that Williams was a "snitch" who was responsible for Donald Brown being in prison.

Lewis told Pitts, "You be hanging around [Williams]. You should do something about it." Pitts testified that Lewis wanted him "to get rid of" Williams, in other words, "to kill him." Pitts agreed because in the BMG Lewis was his "big homie." Pitts and Williams were friends, but Pitts could not say no to Lewis because you "do as your big homies tell you to do."

Several weeks later, Lewis gave Pitts money to buy a cell phone, told him he was leaving for a "bike event" and that he wanted Williams killed "before the weekend." He said he would pay Pitts $5,000. Pitts purchased a cell phone, activated it and registered it in the name of "Joe Luis."

On Friday, May 12, 2006, Pitts arranged a meeting with Williams by telling him that he would introduce him to "some girls." Marlon Thornton drove Pitts to a location off Highway 118. Pitts held a gun in his lap. Williams drove to the area and parked his car. Pitts got out, walked over to Williams and shot him once in the head.

Thornton then drove Pitts to Somis where Pitts hid the gun in some bushes. As they travelled on the 101 freeway towards Los Angeles, Pitts made cell phone calls to Lewis. In one quick call, Pitts told Lewis that he had completed the assignment and Lewis told him that he would be paid in Bakersfield.

On Sunday, Lewis and Pitts met at Lance Sebastian's house in Bakersfield. Lewis gave Pitts $5,000 in cash and one pound of marijuana as payment for killing Williams.

Thornton's Testimony

After Williams was shot, Thornton drove up the grade between Camarillo and Thousand Oaks on the 101 freeway towards Los Angeles. Pitts "made a very quick phone call where he just said, 'It's done.'"

On June 5, 2006, the police came to Thornton's home looking for Pitts. Thornton "panicked" and "started telling . . . about the murder." The police arrested him.

Corroborating Evidence

Because Pitts and Thornton were accomplices, the prosecution introduced evidence to corroborate their testimony. Police Officer Michael Powers testified that Williams was murdered around 9:00 p.m. Cell phone records showed that there were three calls between Pitts's phone and Lewis's phone between 9:00 p.m. and 9:27 p.m. The duration of a call that took place at 9:17 p.m. from Pitts's phone was consistent with the time needed to leave the message, "It's done."

Ronald O'Halloran, the Ventura County chief medical examiner, testified that Williams was killed by a single shot to the head from a distance of six inches to 24 inches.

Robert Coughlin, the prosecution's gang expert, said that in gang culture a shot to the head at close range is "a way to send a message." He said it will "show the other gang members that the conduct of the person that was . . . killed . . . would not be tolerated within that gang."

Michael Adams, a BMG member, testified that a week after Williams was murdered, Pitts went to Las Vegas, spent money at bars and was gambling at the Mandalay Bay $10 blackjack table. Lewis was a BMG "big homie." Shortly after the killing of Williams, Pitts told Adams that he killed him because he was a "snitch" and Lewis and two other BMG members decided he had to be eliminated. Adams said the BMG despises snitches.

Gentry testified that the rumor on the street was that Williams was the one who shot him. Donald Brown was convicted of murder and went to prison. Gentry heard that Williams was also involved in that crime, but was never charged because he cooperated with the police.

Bianca Telliano, Pitts's girlfriend, testified that after Pitts went to Sebastian's house in May, he gave her $1,000 and said, "[W]e're going to be good from here on out." They went shopping and Pitts had cash to spend. He bought clothes for her, bought clothes for himself, and they stayed at a fancy hotel.

Krystal Russell, Williams's girlfriend, testified that before the murder, Pitts stayed with her and Williams. Pitts did not have a job, did not pay rent and did not buy food.

Shawnette Moore, Williams's cousin, testified that Pitts did not own a car, did not have much money and often stayed with Williams and members of her family.

The prosecution introduced recorded phone conversations between Lewis and BMG members. In one, after being informed that Thornton was arrested and Pitts might confess, Lewis said, "Oh, shit. Oh, shit." In another, Lewis told an associate that he sent a lawyer to see Pitts in jail to find out what he would say. The prosecutor also introduced recorded jail conversations between Lewis and Pitts where Lewis said he blamed Pitts for selecting Thornton. He told Pitts that "our whole story gotta be . . . solid," that at the time of the payoff only he and Pitts were there, that Pitts could claim what he did was "personal," that the BMG members would help him, and that "sinking the ship with everybody don't make no sense . . . ."

In the defense case, Lewis testified that he did not "have anything at all to do with the death of Fred Williams." In high school he belonged to a group known as the "Young Black Men," which eventually evolved into the BMG. The BMG did not have a "hierarchy," but there were first-generation members, such as himself and Gentry, and second-generation members. Lewis had heard rumors that Williams shot Gentry.

Lewis testified that he had a meeting with Gentry and Pitts. Pitts said he thought Williams shot Gentry. Lewis never told Pitts he wanted Williams killed. He had

no recollection of Pitts calling him on May 12, around 9:00 p.m., to say, "It's done." Lewis went to Sebastian's house in Bakersfield on Sunday, but did not give Pitts any money. Lewis said he told Darrell Dupras, a friend who went with him to Sebastian's house, to tell the police that they were never there. Lewis said he did this "to cover [his] story." He said he had insulated himself by having others commit crimes in his drug dealing and fencing operations. He gave Pitts money to buy a cell phone so that he could talk with him about a marijuana transaction.

DISCUSSION

I. *Admitting Lewis's Statement to a Bail Bond Agent*

Lewis contends the trial court erred by admitting a statement he made to a bail bond agent. He claims the statement was not an admission; it was inadmissible hearsay, ambiguous, and not relevant. We disagree.

After his arrest, Lewis was placed in a jail cell where he could make phone calls. During a phone call with a bail bond company, a bond agent asked Lewis, "So what are you doing in Ventura? How--did things happen in Ventura?" Lewis: "*They're trying to say I allegedly did something out here*." (Italics added.) Bail bond agent: "Okay." Lewis: "*I just had something to do with it, but not, you know*--" (Italics added.)

Lewis contends that his statement, "I just had something to do with it," was not an admission of guilt and therefore it was inadmissible hearsay. But our Supreme Court has held that out-of-court statements of defendants fall within a recognized exception to the hearsay rule. (Evid. Code, § 1220.) In rejecting a claim similar to the one raised by Lewis, the court said, "[T]he evidence was of a statement made by and offered against defendant, the declarant as well as a party to this prosecution. Regardless of whether the statement can be described as an admission, the hearsay rule does not require its exclusion when it is offered against a party declarant." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1123.)

Lewis argues that his statement was ambiguous and it should have been excluded. He claims it could be considered a denial of culpability and the prosecution should have presented testimony to establish its meaning. But the statements Lewis made

do not require additional evidence to make them comprehensible. They speak for themselves. A reasonable trier of fact could conclude that Lewis was saying that he "had something to do with" the offense he is alleged to have committed.

But even if these statements are not completely free from ambiguity, the result does not change. Where statements are partially ambiguous, this "'concerns only the weight of this evidence, not its admissibility, which does not require complete unambiguity.'" (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1122.) Here "the jury conceivably could have concluded that the statement reflected [Lewis's] acknowledgment of his guilt . . . . Thus, the trial court was justified in admitting the statement and leaving it to the jury to decide whether the statement was in fact an admission, and what weight to attribute to it." (*People v. Medina* (1995) 11 Cal.4th 694, 752.)

Lewis contends the court erred because his remarks were not relevant. But, "The trial court has broad discretion in determining the relevance of evidence . . . ." (*People v. Scheid* (1997) 16 Cal.4th 1, 14.) "The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference" to establish material facts . . . .'" (*Id*. at p. 13.) Here a reasonable trier of fact could logically infer that Lewis was admitting that he had something to do with the murder. The jury could view this remark as being inconsistent with the defense claim of innocence. The statement is also consistent with the prosecution's theory of the case and it bolsters the testimony of the accomplices.

Moreover, Lewis has failed to demonstrate how the result would change if the court had excluded this evidence. The evidence of Lewis's guilt is strong. The jury did not find Lewis to be credible. He was impeached by statements he had made in jail to Pitts and by his statements on recorded telephone conversations. Moreover, Lewis admitted that he tried to create a false alibi. Given the strength of the prosecution's case, any error is harmless.

II. *Accomplice Testimony*

Lewis contends that there was insufficient evidence to corroborate the accomplice testimony that the prosecution introduced. We disagree.

Testimony of an accomplice is inadmissible unless it is corroborated by other evidence. (*People v. Gurule* (2002) 28 Cal.4th 557, 628.) "The law, however, requires only slight corroboration, and the evidence need not corroborate the testimony in every particular." (*Ibid.*) The corroborating evidence "may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*People v. Hayes* (2000) 21 Cal.4th 1211, 1271.) It also may be sufficient even though it is ""entitled to little consideration when standing alone."" (*People v. Avila* (2006) 38 Cal.4th 491, 563.)

The only requirement is that the evidence """"tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth."""" (*People v. Sanders* (1995) 11 Cal.4th 475, 535.) An accomplice's testimony may be corroborated by the defendant's testimony as well as the defendant's out-of-court statements. (*People v. Gurule*, *supra*, 28 Cal.4th at p. 628.)

A. *Corroboration from Lewis's Admissions, Phone Calls and Jail Conversations*

Lewis's statement, "I just had something to do with it," was a compelling admission because he was talking about being accused of murder. A trier of fact could reasonably infer that this volunteered remark showed Lewis's consciousness of guilt and could draw an inference that it partially corroborated Pitts's testimony.

But there were additional admissions. The prosecution claimed Lewis, as a leader of a criminal enterprise, used others, such as Pitts, to commit crimes and insulate himself. Lewis testified that he "brokered" cocaine deals and was "fronting" marijuana to Pitts so he could make money for himself. He admitted using others to commit crimes in his drug dealing and fencing operations so that he could "stay at the top" and insulate himself. Lewis also referred to Pitts as "one of [his] little thugs."

The prosecution also introduced highly incriminating phone conversations. In a recorded call after Thornton was arrested, fellow gang member Greg Wells told Lewis that Thornton had "turned himself in" to the police, "rolled over," and Pitts was "about to fold." Lewis responded, "Oh, shit. Oh, shit." A trier of fact could reasonably

infer that Lewis was alarmed by this news because of the incriminating implications for himself. The next day Lewis told an unidentified caller, "It's all bad right now. [¶] . . . [¶] They picked up one of my little thugs for murder and he supposedly in there telling like crazy." In fact, Lewis was so concerned that he sent a lawyer to visit Pitts in jail, but not to represent him. In a phone call with an associate, Lewis said the lawyer went there "to see where [Pitts's] head's at . . . ."

Later, in recorded jail conversations, Lewis suggested to Pitts that he could say, "I did that shit for my own personal reasons." He also said, "[Y]ou could say I don't know nothin' about nothin'." In another conversation, Lewis told Pitts he erred by having Thornton assist him. He said, "The mistake is . . . you have something . . . you was gonna do. You just took the wrong nigger with you to do it."

Lewis was concerned that Thornton might expose what he and Pitts had discussed in confidence which would hurt the BMG. Lewis told Pitts, "[Y]ou just chitchatting with [Thornton] a whole bunch and you done told him this and that . . . . [¶] . . . [¶] . . . I know what me and you talked about. . . . *[W]hat was between you was supposed to be between me and you*." (Italics added.) "[Y]ou brought [Thornton] into the circle . . . and you busted the whole thing up." He said the people Pitts trusted are unreliable because they "can't hold water" and "that fucked everybody up." Lewis advised Pitts, "[Y]ou know, *sinking the ship with everybody don't make no sense*. . . . The motherfuckers are there to help you, you know what I mean?" (Italics added.) Lewis said, "[O]ur whole story gotta be you know, solid." The jury could reasonably infer that Lewis was trying to convince Pitts not to expose him and the BMG. This was corroborating evidence showing Lewis's consciousness of guilt.

B. *Corroborating Evidence about Post-Murder Cell Calls and the Cash Payment*

Pitts testified that after he committed the murder he made phone calls to Lewis. Thornton testified that in one of those calls, Pitts said, "It's done." Powers' testimony showed that phone records corroborated Pitts's and Thornton's testimony about the calls Pitts made to Lewis shortly after the murder. (*People v. Vu* (2006) 143

Cal.App.4th 1009, 1023.) The duration of the call that occurred at 9:17 p.m. was consistent with someone leaving the message, "It's done."

In addition, in a recorded jail conversation, Pitts told Lewis that he thought Lewis's phone was tapped when he called Lewis to tell him "it was done." Instead of denying that Pitts made such a call, Lewis made the incriminating remark, "I don't know *when* that call was." (Italics added.) Lewis also admitted in testimony that he gave Pitts the money to buy the cell phone.

Pitts testified that Lewis gave him $5,000 in cash as payment for the murder. The testimony of Telliano, Adams, Russell and Moore showed that after the murder Pitts's financial condition quickly improved. From this, a trier of fact could reasonably infer that Pitts, a man with little resources, was now on a spending spree using the money Lewis gave him. (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1304-1305 [evidence of defendant's recent spending spree properly admitted to corroborate accomplice's testimony].)

In addition, in a recorded jail conversation, Pitts told Lewis that the authorities "told me someone saw you give me the five G's in Bakersfield the Sunday after [Williams] was murdered." Lewis responded, "Wasn't nobody else there, was it?" The jury could reasonably infer that Lewis had incriminated himself. This remark showed Lewis knew who was at the payoff site and knew that only he and Pitts were there.

C. *Evidence about being at Sebastian's House and Lewis's False Alibi*

The Attorney General claims that the fact that Pitts and Lewis were at Sebastian's house on Sunday is highly incriminating. He argues that the jury could reasonably infer that Lewis knew this and he consequently attempted to create a false alibi. We agree.

Pitts said Lewis paid him at Sebastian's house in Bakersfield. He testified that Lewis arrived Sunday morning in a truck with a motorcycle in the back and Lewis had a trophy he won at a motorcycle contest. Sebastian testified and corroborated Pitts's

testimony on the details about Lewis's arrival and said Pitts and Lewis were at his house at the same time on Sunday.

Darrell Dupras, a friend of Lewis, testified that he and Lewis drove home that Sunday from a motorcycle event in Oakland and never stopped in Bakersfield or at Sebastian's house. But the prosecution introduced a recorded phone conversation between Dupras and Lewis which took place in June of 2006. Lewis told Dupras, "Just for the record when we came back from Oakland that time. . . . [¶] We just went straight through. Didn't stop nowhere but for gas." Dupras responded, "Oh, yeah. Most definitely."

Lewis admitted on cross-examination that what he told Dupras was an attempt "to cover my story on that occasion" and that they had in fact stopped in Bakersfield at Sebastian's house. A reasonable juror could infer that this admission was corroborating evidence because Lewis attempted to use Dupras to create a false alibi. (*People v. Santo* (1954) 43 Cal.2d 319, 327 [attempt to rig a false alibi was corroborating evidence tending to link defendant to the crime].)

The jury also could find that Lewis was not a credible witness. Because of his jail conversation with Pitts about "the 5 G's" (section B above), jurors could reasonably infer that Lewis changed his story about not being at Sebastian's house after he heard the prosecution's evidence and saw how Dupras was impeached by the recorded phone conversation.

D. *Independent Evidence of a Gang-Style Killing, Motive and BMG Protocol*

Pitts claimed the killing of Williams was not personal. It was part of the gang's business of eliminating a snitch. The prosecution introduced evidence to show that Pitts had no personal motive to kill Williams. Talib Zaid, a BMG associate of Williams and Pitts, testified that Pitts and Williams were "best of friends" and there was no "animosity between" them. Prior to committing the crime, Pitts told Zaid that Williams "got to go," but Pitts did not express any "personal desire to do this." After the killing, Pitts was "distraught." In addition, from Coughlin's and O'Halloran's testimony, the jury could reasonably infer that the way Williams was killed with a shot to the head

showed that he was the victim of a gang-style execution which was intended to send a message.

There was also independent evidence of a BMG motive for the killing. Adams said the BMG despises members who are snitches and the gang targets them. Gentry said Donald Brown, a BMG member, went to prison for murder. He heard that Williams was also involved in that crime, but never charged because he cooperated with the police. Detective Scott Peterson testified that Zaid told him that he felt Williams was murdered in retaliation for what happened to Brown. Lewis testified that cooperating with police makes one a "snitch" and "being a snitch is a bad thing." Moreover, Gentry was shot in 2005. Gentry testified that he heard rumors that Williams did it. A trier of fact could reasonably infer that Lewis and the BMG had a motive to eliminate Williams for being a snitch and shooting Gentry, and this independent evidence corroborated Pitts's testimony. (*People v. Vu*, *supra*, 143 Cal.App.4th at pp. 1022-1023.)

Pitts claimed there was a gang protocol requiring him to obey the request of Lewis because he was a "big homie." Adams testified Lewis was a "big homie," someone who has been with the BMG for a long time and is entitled to be "respected" by younger members. Lewis testified that Pitts was "one of the little homies," and he admitted that there were first- and second-generation BMG members. Coughlin testified that a BMG member must "put in work in order to maintain [his] gang status." If a member refuses, he could be considered "lame" and be disrespected by the gang. One gang member will often ask another "to handle" a fellow member who has caused an "infraction." The system is based on "respect." Lewis admitted that he used others to commit crimes to insulate himself. In jail, he chided Pitts for violating protocol by using Thornton, a person who could not be trusted to keep a secret and who could incriminate Lewis and the gang.

Lewis notes that after being arrested accomplices often invent stories to falsely implicate others. But here the prosecution presented evidence to show that Pitts's claim about Lewis's involvement was not a post-arrest invention. Adams testified that a week after Williams was killed, and prior to Pitts's arrest, Pitts visited him and told him

that he had killed Williams because he was a "snitch." Pitts told Adams that Lewis and two other BMG members decided Williams had to be eliminated and Pitts was "the hit man." The evidence was sufficient.

III. *Prosecutorial Misconduct*

Lewis contends that the prosecutor's arguments to the jury constituted prejudicial misconduct and require that his conviction be reversed. We disagree.

"Prosecutorial misconduct is reversible under the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.'" (*People v. Guerra, supra*, 37 Cal.4th at p. 1124.) "'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.'" (*Ibid.*)

A. *Waiver*

The Attorney General claims Lewis waived this issue by not raising an objection at trial. To preserve a claim of prosecutorial misconduct on appeal, the defense must make a timely objection and request an admonition. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.) Here Lewis contends that certain remarks by the prosecutor in closing argument constituted misconduct. But his trial counsel did not object to these statements. Lewis has consequently waived this issue. But, even on the merits, the result is the same.

B. *Statements Involving the Burden of Proof*

Lewis claims that the prosecutor attempted to shift the burden of proof in her remarks to the jury. We disagree.

Lewis notes that in closing argument the prosecutor said, "*This defendant is a gangster. He's spent his entire adult life pledging to be a part of a criminal organization that has committed crime after crime. Their primary purpose is to commit violent crime. But he wants you to believe that in this case, in this one situation he's committing all this other crime, oh, but not this one.*" (Italics added.)

Lewis contends that by these remarks the prosecutor was asking the jury "to ignore her burden of proof" and rely instead on his propensity to commit crimes. But she made no such statement and did not refer to the burden of proof. These remarks were primarily part of an argument about Lewis's lack of credibility as a witness. The prosecution introduced evidence about Lewis's gang's activities and his record of committing crimes. """[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence . . . ."" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

Lewis has cited only to a portion of the prosecutor's remarks. The prosecutor went on to say, "You know, there's so much that you all have heard, *evidence that cannot be contradicted like those cell phone towers*." (Italics added.) Here no reasonable juror would believe that the prosecutor was inviting jurors to ignore the court's instructions on the burden of proof or the evidence about the charged offense.

Lewis claims the prosecutor committed misconduct by stating: "The defendant would love it for you all to fight amongst yourselves, bicker with one another and not be able to reach a verdict. I'm going to ask you to be patient with one another, work together, study the evidence, listen to anything that you want to hear again and look at what's really going on here. [¶] Rely on your life experience, understand what John Lewis did to Bakari Pitts to make this happen. Understand why it is that he wanted Fred Williams eliminated, and you know that's how people work. That's what they do. [¶] *All he needs is one of you, that's all he needs, one person to say, 'Nah, You know what, Bakari's a liar. It's not good enough.*'"

Lewis contends, "[T]he statement that [he] only needs one juror to say that Pitts is not credible to prevent conviction again reduces the burden of proof." We disagree.

Here the prosecutor was simply responding to a defense argument which asked any potential hold-out juror to stand firm against a majority who voted for conviction. Lewis's counsel told the jury, "And it doesn't matter if you come back without a verdict. You don't have to. You're not required under the law to reach a

verdict. You can say, 'I respectfully disagree . . . .'" The remarks were an answer to that defense argument. Telling jurors to listen to each other and work together is not improper. (*People v. Boyette* (2002) 29 Cal.4th 381, 436-437.) Moreover, the prosecutor unequivocally told jurors, "[T]he burden of proof lies on the prosecution. We own that and there is no question about that." There was no misconduct.

C. *Asking for Sympathy for Victims*

Lewis claims the prosecutor appealed to the emotions of jurors and asked them to consider sympathy for the victims. He contends that her remarks were so prejudicial that a reversal is required. We disagree.

"'[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt.'" (*People v. Kipp, supra*, 26 Cal.4th at p. 1130.) But an isolated reference to the victims does not automatically constitute reversible error, unless the comments are repeated and would likely influence the jury's verdict. (*Ibid.*)

Lewis notes that the prosecutor told jurors, "*The number of lives ruined by this man's behavior is really unfathomable. Fred Williams, his family, his mother, his sister, his kids. That's just in the immediate circle.* [¶] *Marlon Thornton, his family, and all of the other young black men who looked up to and idolize and fear the defendant. This reign of power that he has over people is devastating to entire communities, not just one victim, and it's time for that reign to stop.*" (Italics added.)

Lewis argues that this was an improper appeal for sympathy for the victims. The Attorney General responds that the argument about Lewis's control over his younger associates involved reasonable inferences from the evidence and was relevant to the prosecutor's theory about how Lewis was able to have others commit a murder at his request. True, but the reference to the victim and his family was unnecessary and unrelated to any relevant issue for the jury's consideration. (*People v. Kipp, supra,* 26 Cal.4th at p. 1130.)

But these remarks were relatively short. The jury was not subjected to an extended colloquy about the family's hardship and suffering. The remarks were not so prejudicial that they could not have been cured by an admonition to the jury had Lewis's

counsel made an objection. (*People v. Powell* (1974) 40 Cal.App.3d 107, 166 [prosecutor's reference to victim's wife and children "should have been avoided," but was "relatively mild" and not prejudicial misconduct].) The trial court instructed jurors, "Nothing that the attorneys say is evidence." A reversal is not required because there is no reasonable probability that the absence of these remarks would change the result. (*People v. Kipp*, *supra*, 26 Cal.4th at p. 1130.)

D. *Appealing to the Emotions of Jurors*

Lewis claims the prosecutor appealed to the prejudices of jurors by making the following comments to the jury: "*You've got the big fish here*. The guy who's making crime happen all over the place. The guy who made a murder happen. The guy who signed the death warrant on Fred Williams . . . . [¶] *You all were picked as jurors because of your life experiences. I talked to you all about what you do for a living, experiences that you've had. You're teachers. You've been coaches. You know what it's like with kids. You're parents, fighting against the tide that is created by monsters like the defendant who lure in young people to become their thugs, to do their dirty work for them, and then use them and throw them away is despicable.* [¶] *This is really as good as it gets as far as a case that shows you who is in charge of all this crime. You've got it. You've got it all laid out in front of you. Take the opportunity to cut the head off this monster.*" (Italics added.)

Lewis claims it was misconduct for the prosecutor to refer to him as a "monster" and then urge jurors to "cut the head off this monster." The prosecutor substituted the word "monster" for murderer in referring to Lewis. This was not a model of prosecutorial eloquence in argument. But prosecutors are not limited to "Chesterfieldian politeness" and may use "appropriate epithets" in their arguments to the jury. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819; *People v. Sully* (1991) 53 Cal.3d 1195, 1249 [prosecutor's reference to defendant as a "human monster" and a "mutation" in discussing his egregious conduct was not misconduct].)

The prosecutor also said, "You're parents, fighting against the tide that is created by monsters like the defendant who lure in young people to become their thugs."

She added, "And you as members of the community now you get the chance to do something about it." Lewis contends that this was an emotional appeal to jurors to act for the benefit of the community as opposed to being neutral fact finders. He claims such an argument constitutes a denial of his constitutional right to a fair trial.

Many courts have concluded that prosecutorial "[a]ppeals to the jury to act as the conscience of the community, unless designed to inflame the jury, are not per se impermissible." (*United States v. Kopituk* (11th Cir. 1982) 690 F.2d 1289, 1342-1343; see also *United States v. Lewis* (8th Cir. 1976) 547 F.2d 1030, 1037; *United States v. Alloway* (6th Cir. 1968) 397 F.2d 105, 113 ["And I'm calling on this jury to speak out for the community" was not prosecutorial misconduct].)

Some courts, however, have noted that such appeals are distractions and pose a danger that jurors may take on the role of solving societal problems. (*United States v. Solivan* (6th Cir. 1991) 937 F.2d 1146, 1153.)

The language the prosecutor used here is similar to the appeals prosecutors made to jurors in *People v. Adanandus* (2007) 157 Cal.App.4th 496, 511-512, and *People v. Lang* (1989) 49 Cal.3d 991, 1041. In *Adanandus*, the prosecutor said, "'Ladies and gentlemen, the 2500 block of 65th Avenue . . . had no concept of law and order. . . . What you can do is restore justice to that street. . . . Restore the law to the 2500 block of 65th Avenue . . . .'" (*Adanandus*, at pp. 511-512.) The Court of Appeal said, "The prosecution's references to the idea of restoring law and order to the community were an appeal for the jury to take its duty seriously, rather than efforts to incite the jury against defendant. Thus, they were not misconduct." (*Id.* at p. 513.)

In *Lang*, the prosecutor said, "'*if you want to have a voice in your community and an effect upon the law in the community, this is your opportunity*.'" (*People v. Lang*, *supra*, 49 Cal.3d at p. 1041.) The court concluded, "No reasonable juror would have construed the remarks as urging the jurors to follow community sentiment rather than their own judgment." (*Ibid*.)

Here the prosecutor made these remarks as part of a conclusion to an argument involving the facts the prosecution claimed it had proved. She was asking

jurors to take action because of the evidence, not in spite of it. Although these statements were not necessary to her argument, they do not fall within the category of being deceptive or reprehensible. (*People v. Adanandus*, *supra*, 157 Cal.App.4th at p. 513.)

IV. *The Restitution Fine*

Lewis contends the trial court erred by imposing a $10,000 restitution fine pursuant to section 1202.45. The Attorney General agrees. They are correct.

The trial court imposed the $10,000 fine, but stayed it "pending successful completion of parole pursuant to Section 1202.45 . . . ." But the court sentenced Lewis to a term of life without the possibility of parole. Because of this sentence, this restitution fine was unauthorized. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1181-1182.)

We have reviewed Lewis's remaining contentions and conclude that there was no reversible error.

The restitution fine is stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

James P. Cloninger, Judge

Superior Court County of Ventura

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

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